Office of Chief Counsel
Internal Revenue Service

memorandum

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date:

to: Chief, Quality Measurement Staff
Attn: Rick Scavarda, District Technical Coordinator

from: District Counsel, Michigan District, Detroit

subject: [redacted] - Mitigation Provisions

This memorandum is in response to your request for advice on March 16, 2000, regarding the applicability of I.R.C. §§ 1311 - 1314 (the mitigation provisions) to the fiscal year ending March 31, [redacted] for [redacted], and subsidiaries. This issue is being coordinated with our National Office. The advice in this memorandum is subject to post-review in the National Office, which we will expedite. If you have any questions, please call the undersigned at (313) 237-6426.

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

Issues

I. Whether the mitigation provisions of I.R.C. §§ 1311 through 1314 may be applied to make an assessment for a year barred by the statute of limitations where alternative minimum tax credit carry forwards create an overassessment in a subsequent year not barred by the statute of limitations.

II. If an assessment cannot be made for a prior year, from which alternative minimum tax credit carry forwards create an overassessment in a subsequent year, can the refund be issued for an overassessment in the subsequent year.

Proposed Conclusions

I. The mitigation provisions do not apply where deficiency adjustments in a year where assessment is barred by the statute of limitations give rise to alternative minimum tax credit carry forwards in a subsequent year.

II. The inability to make an assessment in a prior year, from which alternative minimum tax credit carry forwards originate (and create an overassessment in a subsequent year), does not prevent the overassessment determination in the subsequent year.

Facts

[redacted], and its Subsidiaries ("the taxpayer") timely filed its original Form 1120 U.S. Corporate Income Tax Return for the fiscal year ended March 31, [redacted], on [redacted]. The taxpayer filed a Form 1120X Amended U.S. Corporation Income Tax Return for the fiscal year ended March 31, [redacted], on [redacted]. The amended return reflected an additional tax due of $[redacted] and payment was submitted with the return. The Cincinnati Service Center filed the amended return but did not assess the tax. The statute of limitations for assessing the tax related to the amended return for the fiscal year ended March 31, [redacted], expired on [redacted], while the amended return was in the possession of the Examination Division. The Examination Division has reviewed the adjustments related to the amended return (See attachment A) and agrees with the position taken by the taxpayer.

The 1120X for fiscal year ended March 31, [redacted], claims alternative minimum tax credit carry forwards from the [redacted] fiscal year which results in an overassessment of $[redacted]. The Examination Division has reviewed the amended return for fiscal year [redacted] and agrees that the overassessment as shown is correct.

(See attachment B). Previous advice provided by this office indicated that a closing agreement pursuant to I.R.C. § 7121 would not be appropriate to effect as assessment of the additional tax liability shown on the 1120X for the [redacted] fiscal year. The Examination Division now wants to apply the mitigation provisions of I.R.C. §§ 1311 through 1314 to make the assessment for the [redacted] fiscal year. The taxpayer has executed a Form 2259, Agreement as a Determination Pursuant to Section 1313(a)(4) of the Internal Revenue Code, which details those adjustments for which they seek to have the mitigation provisions apply. (See attachment C).

Discussion

I. Mitigation

The mitigation provisions of I.R.C. §§ 1311 through 1314 allow the correction of the erroneous treatment of specified items under certain circumstances where correction of the erroneous treatment would otherwise be barred by the statute of limitations or some other rule of law. The relief afforded by the mitigation provisions is not available unless five specific factors exists:

(1) an error must have occurred (I.R.C. § 1311(a).

(2) the correction of the error must be prevented by the operation of any law or rule of law (e.g. the statute of limitations) (I.R.C. § 1311 (a));

(3) a specifically enumerated circumstance of adjustment must exist (I.R.C. § 1312(1) through (7);

(4) a determination must exist which requires treatment that is inconsistent with the treatment in question (I.R.C. § 1313). Section 1313(a)(4) of the Code defines a determination in part as "... an agreement for purposes of this part, signed by the Secretary and by any person, relating to the liability of such person (or the person for whom he acts) in respect of a tax under this subtitle for any taxable period. A Form 2259 is to be used when the Commissioner and the taxpayer wish to execute, a "determination" for the purposes of I.R.C. § 1313; and

(5) the proper relationship must exist at the proper time, between the taxpayer with respect to whom a determination is made and the taxpayer with respect to whom the error was made (I.R.C. § 1313(c)).

In the present case the only identifiable error was that of the Service failing to properly process and assess the deficiency shown on the timely filed amended return for fiscal year ended [redacted] before the statute of limitations for doing so expired. As noted in our earlier advice on this matter, payment of the full amount of tax due and owing for the [redacted] amended return was submitted with the return and may be retained by the Service despite the inability to assess the tax.

The adjustments made to the fiscal year ended [redacted] tax returns are not of the type of circumstances under which mitigation is appropriate. Those circumstance are detailed in I.R.C. § 1312 and consist of:

1. Double inclusion of an item of gross income;
2. Double allowance of a deduction or credit;
3. Double exclusion of an item of gross income;
4. Double disallowance of a deduction or credit;
5. Correlative deductions and inclusions for trusts or estates and legatees, beneficiaries or heirs;
6. Correlative deductions and credits for certain related corporations; and
7. Basis of property after erroneous treatment of a prior transaction.

Mitigation requires a determination that the prior treatment in the barred year was erroneous, the maintenance of an inconsistent position by the party in whose favor the determination was made, and a relationship between the party benefitting from the error and the party prevailing in the determination. Absent some erroneous inclusion, exclusion, omission, allowance, disallowance, recognition, or nonrecognition, as the case may be, with respect to the seven enumerated circumstances listed above the mitigation provisions do not apply.

The adjustments as shown on the amended return for fiscal year [redacted] and accepted by the Examination Division do not fall within any of the categories/circumstances shown above. Similarly, the "determination" effected by the Form 2259 detailing the adjustments shown in the amended returns does not fall within the ambit of the mitigation provisions.

II. Refund Allowance

The issue now turns to whether the overassessment claimed on the timely filed amended return for fiscal year ended March 31, [redacted], may be allowed in the absence of the Service's inability to make the deficiency assessment for fiscal year ended [redacted]. Based on the information provided to this office, it appears that the position adopted by the Examination Division is that the refund for fiscal year [redacted], must be held pending the assessment for fiscal year [redacted]. It also appears that this position may have been the precipitating factor for the taxpayer to: 1) indicate a willingness to enter into the closing agreement, discussed in our prior advice, to allow an assessment for a barred year; and 2) agree to execute the Form 2259 which would also allow the assessment for fiscal year [redacted] if the mitigation provisions had otherwise applied. The refund claimed by the taxpayers for fiscal year [redacted] is $[redacted].

In Lewis v. Reynolds, 284 U.S. 281 (1932), the Commissioner audited petitioner's return and assessed a deficiency. Petitioner paid the deficiency and asked for a refund. The Commissioner denied this request and issued a revised computation that allowed some previously denied deductions, but showed a greater tax liability than before. The Supreme Court held that the Commissioner had the authority in acting upon a claim for refund to redetermine and reassess the tax after the of limitations ran. The Court stated that a claim for refund involves a redetermination of the entire tax liability, and that while no new assessment can be made after the statute of limitations had expired, the taxpayer is not entitled to a refund unless there has been an overpayment of tax.

Similarly, in the present case, the Service must properly determine the correct amount of overassessment for the fiscal year [redacted], regardless of whether the deficiency assessment can be made for fiscal year [redacted]. This is particularly so where the Service's inability to make the deficiency assessment in the prior year was due to its own error, i.e. allowing the statute of limitations to expire while the timely filed amended return for fiscal year [redacted], was in the possession of the Examination Division. As noted above, the correct determination for the overassessment shown on the fiscal year [redacted] amended return has been reviewed and accepted by the Examination Division and is not in dispute. Consequently the inability to assess the deficiency for the [redacted] fiscal year does not bar the overassessment determination for fiscal year [redacted].

Should you have any questions or concerns regarding this matter, please contact the undersigned attorney at (313) 237-6426.

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By: ____________________
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